

Interpreting the Tort Liability of the State of Ohio: *Reynolds v. State*

I. INTRODUCTION

There is a remarkable diversity in the nature and origin of immunity rules. Some of these rules are created at common law, some by statute, and some under the Constitution. In general, there has been an increased hostility to absolute immunity with the passage of time. Thus, many personal immunities, such as those that bar suits between spouses, between child and parent, or against charities, have been abandoned or are now in the process of contraction, if not disintegration. Governmental and official immunities are more problematic.¹

Ohio courts have exhibited an antagonism toward the plethora of immunities which have accumulated from years of judicial precedent. Over the years, the Ohio Supreme Court has abolished interspousal immunity,² parental immunity,³ charitable immunity,⁴ and local governmental immunity.⁵

In *Reynolds v. State*,⁶ the Ohio Supreme Court fashioned a seemingly paradoxical majority opinion. On the one hand, the opinion symbolized the continuing commitment to limit immunities by expanding the state's tort liability. At the same time, however, the court restricted the type of claims against the state that are amenable to suit.

The plaintiff in *Reynolds* sought damages for injuries resulting in her complete paralysis after being brutally raped and assaulted.⁷ At the time of the attack, the assailant, a convict, was on a statutorily-authorized work furlough from prison.⁸ The statute allows "trustworthy prisoners" to be released while they are pursuing approved educational or employment opportunities.⁹ It also provides, however, that a furloughed prisoner "shall be confined for any period of time that he is not [engaged in] his approved . . . program."¹⁰

1. R. EPSTEIN, C. GREGORY & H. KLEIN, *CASES AND MATERIALS ON TORTS* 839 (4th ed. 1984).

2. *Shearer v. Shearer*, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985).

3. *Signs v. Signs*, 156 Ohio St. 566, 103 N.E.2d 743 (1952).

4. *Albritton v. Neighborhood Centers Ass'n for Child Dev.*, 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

5. *Enghauser Mfg. Co. v. Eriksson Eng'g Ltd.*, 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983); see generally *Celebrezze & Hull, The Rise and Fall of Sovereign Immunity in Ohio*, 32 CLEV. ST. L. REV. 367 (1983) (tracing the acceptance and abrogation of immunity for municipal corporations); but see OHIO REV. CODE ANN. §§ 2744.01-.09 (Anderson Supp. 1986) (restored limited immunity to political subdivisions).

6. 14 Ohio St. 3d 68, 471 N.E.2d 776 (1984).

7. *Id.*

8. *Id.*; see OHIO REV. CODE ANN. § 2967.26 (Anderson 1987). This statute reads in part:

The adult parole authority may grant furloughs to trustworthy prisoners, other than those serving a sentence of imprisonment for life imposed for an offense committed on or after October 19, 1981, who are confined in any state penal or reformatory institution for the purpose of employment, vocational training, educational programs, or other programs designated by the director of rehabilitation and correction within this state. No prisoner who is serving a sentence of imprisonment for life imposed for an offense committed on or after October 19, 1981 shall be granted a furlough.

A prisoner who is granted a furlough pursuant to this section shall be confined for any periods of time that he is not actually working at his approved employment or engaged in a vocational training or other educational program.

9. *Id.*

10. *Id.* The specific statutory duty of confinement distinguishes this case from those cases in other jurisdictions

The trial court dismissed the plaintiff's complaint against the state for failure to state a claim upon which relief could be granted. The appellate court subsequently affirmed the trial court.¹¹ The Ohio Supreme Court reversed, maintaining that individuals may hold the state liable for personal injuries proximately caused by the state's failure to adequately monitor prisoners in the furlough program.¹² The significance of the *Reynolds* decision is twofold. First, the Ohio Supreme Court held that a statutory duty to confine furloughed inmates creates, on the part of the state, a clear obligation that runs to individual members of the public. Second, the court held that discretionary acts by state officials are expressly protected from tort liability by the Court of Claims Act.

This Note will begin by examining the historical evolution of sovereign immunity followed by a discussion of the current federal and Ohio statutes that limit the doctrine.¹³ By addressing the dissent's major challenges to the *Reynolds* decision, this Note will endorse the imposition of liability upon the state, pursuant to a statutory duty.¹⁴ This Note, however, questions the reasoning used by the majority in finding a "discretionary exception" in the state's waiver of immunity statute.¹⁵ Finally, this Note will propose an alternative method of calculating meritorious claims in the face of competing policy considerations.¹⁶

II. BACKGROUND OF SOVEREIGN IMMUNITY

A. Conceptual Development

Sovereign immunity¹⁷ is traced to the English concept that "the king can do no wrong."¹⁸ Although the origin of the phrase is largely unsettled, by 1268 the principle that the king could not be sued *eo nomine* in his own courts without his consent was widely accepted.¹⁹ However, this immunity was purely personal in nature and did not attach to the government as a whole.²⁰ Claims affecting the king could be judicially maintained when the suit named one of the king's officers as a party to the action, rather than the Crown itself.²¹ Furthermore, equitable relief against the Crown was available in the Court of Exchequer.²² Even legal relief was

where the state was excused from liability for the actions of temporarily released inmates. See *LeBlanc v. State*, 393 So. 2d 125 (La. Ct. App. 1980), *cert. denied*, 394 So. 2d 1235 (La. 1980); *Scochemaro v. State*, 6 Misc. 2d 543, 165 N.Y.S.2d 609 (N.Y. Ct. Cl. 1957).

11. *Reynolds v. State*, No. 83AP-348, slip op. at 2799 (Ohio 10th Dist. Ct. App. Oct. 27, 1983), *rev'd*, 14 Ohio St. 3d 68, 471 N.E. 2d 776 (1984).

12. *Reynolds v. State*, 14 Ohio St. 3d 68, 70, 471 N.E.2d 776, 778-79 (1984).

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part III(D).

16. See *infra* Part IV.

17. For the purpose of this Note, "governmental immunity" and "sovereign immunity" are synonymous and will be used interchangeably.

18. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 316, p. 1033 (5th ed. 1984).

19. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963).

20. Watkins, *The State as a Party Litigant* 12 (Series XLV, No. 1) (1927).

21. Jaffe, *supra* note 19, at 1.

22. See *Pawlett v. Attorney Gen.*, 145 Eng. Rep. 550, 552 (1668).

routinely available in suits pursued against the Crown *eo nomine* when consent and authorization to sue were obtained by petition of right, as opposed to the issuance of a writ.²³ Yet this formalistic requirement of consent did not necessarily imply the superiority of the king over the law.²⁴ Indeed, Bracton, an early commentator and legal historian, stated that "[t]he law makes the king, therefore, the king must make a return present to the law by subjecting himself to its rules."²⁵ Thus, it appears that the expression "the king can do no wrong" originally meant precisely the opposite of what it later came to mean. The expression initially signified that "the King must not, was not allowed, not entitled to do wrong"²⁶ As the California Supreme Court concluded:

At the earliest common law the doctrine of "sovereign immunity" . . . began as the personal prerogative of the king, gained impetus from sixteenth century metaphysical concepts, may have been based on the misreading of an ancient maxim, and only rarely had the effect of completely denying compensation. How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called "one of the mysteries of legal evolution."²⁷

The maxim evolved into its present-day meaning over several centuries. Blackstone noted that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power"²⁸ The early English case of *Russell v. Men of Devon*²⁹ is often cited as the forerunner of the present-day doctrine. In *Russell*, the court denied a farmer recovery when his wagon was damaged while trying to cross a bridge that was in disrepair.³⁰ The *Russell* court reasoned that an unincorporated entity was not subject to suit and no corporate fund was available from which damages could be paid.³¹ One member of the court believed it was "better that an individual should sustain an injury than that the public should suffer inconvenience."³²

The United States Supreme Court at first rejected sovereign immunity for the states.³³ Shortly thereafter, the eleventh amendment, which stripped the federal courts of jurisdiction over any claims made against one of the states by private individuals, was adopted.³⁴ Chief Justice Marshall explained the impetus behind the amendment's ratification:

23. Jaffe, *supra* note 19, at 1.

24. *Id.* at 3.

25. Schulz, *Bracton on Kingship*, 60 ENG. HIST. REV. 136, 168 (1945).

26. Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1, 2 (1921).

27. *Muskopf v. Coming Hosp. Dist.*, 55 Cal. 2d 211, 214-15, 359 P.2d 457, 458-59, 11 Cal. Rptr. 89, 90-91 (1961).

28. 1 W. BLACKSTONE, COMMENTARIES *235.

29. 100 Eng. Rep. 359 (1788).

30. *Id.* at 359-60.

31. *Id.* at 362; see also Martin, *Common Law Sovereign Immunity and the Maine Torts Claims Act: A Rose by Another Name*, 35 ME. L. REV. 265, 267 (1983).

32. *Russell v. Men of Devon*, 100 Eng. Rep. 359, 362 (1788).

33. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (The language in Article III of the United States Constitution conferring on federal courts jurisdiction over disputes "between a State and Citizens of another State" meant that a state could be sued without its consent.)

34. U.S. CONST., amend. XI; see also Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 6 (1972).

[A]t the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. . . . [T]o quiet the apprehensions . . . , this [eleventh] amendment was proposed in Congress, and adopted by the State Legislatures.³⁵

*Mower v. Leicester*³⁶ is the first American case to expressly apply the *Russell* sovereign immunity doctrine.³⁷ The plaintiff in *Mower* sued the inhabitants of the town of Leicester for the loss of his horse, caused by the neglect of the town to keep a bridge in repair.³⁸ Without explaining why *Russell* was applicable to *Mower*, the court simply concluded that "the reasoning there is conclusive against the action."³⁹ Less than ten years after *Mower*, the United States Supreme Court admitted the entrenchment of sovereign immunity on the federal level when they wrote that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States"⁴⁰ This view persisted well into the twentieth century. Justice Holmes explained the premise upon which this view was based: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."⁴¹ The modern view of sovereign immunity, as explained by Justice Holmes, soon became firmly established in American jurisprudence, preventing legal actions against both the federal and state governments.⁴²

To mitigate the harsh results of immunity, Congress frequently found it necessary to consider private bills to compensate individuals for injuries resulting from the federal government's negligent conduct.⁴³ In 1939, the United States Supreme Court noted the growing societal dissatisfaction with governmental immunity.⁴⁴ Thus, the deluge of private congressional bills for relief,⁴⁵ increasing public sentiment for greater governmental responsibility,⁴⁶ and persistent scholarly criticism,⁴⁷ persuaded Congress to take action in the area of governmental tort immunity.

35. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

36. 9 Mass. 247 (1812). Cf. *Whitney v. Worcester*, 373 Mass. 208, 366 N.E.2d 1210 (1977).

37. *Martin*, *supra* note 31, at 267; but cf. *Black v. Rempubliam*, 1 Yeates 140 (Pa. 1792); *Commonwealth v. Colqhouns*, 12 Va. (2 Hen. & M) 213 (1808).

38. *Mower v. Leicester*, 9 Mass. 247, 250 (1812).

39. *Id.*

40. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

41. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

42. Hall, *Sovereign Immunity and Reemergence of the Governmental/Proprietary Distinction: A Setback in Idaho's Governmental Liability Law*, 20 IDAHO L. REV. 197, 202 (1984).

43. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 723 (1947); see also Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 800 n.25.

44. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 391 (1939).

45. *Davis*, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 831 n.23; see *supra* text accompanying note 43.

46. *Mikva*, *Sovereign Immunity: In a Democracy the Emperor has No Clothes*, 1966 U. ILL. L.F. 828, 832.

47. See, e.g., Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1 (1924); *Davis*, *supra* note 45.

B. Federal Tort Claims Act

In 1946, Congress enacted the Federal Tort Claims Act.⁴⁸ The Act allowed recovery in tort against the federal government “in the same manner and to the same extent as a private individual under like circumstances”⁴⁹ The Act provided a number of exceptions to liability: claims arising from the transmission of postal matter;⁵⁰ claims from military activities in times of war;⁵¹ and claims from intentional torts committed by federal officials other than “investigative or law enforcement officers.”⁵² The most important limitation in the Act excepts claims “based upon the exercise or the failure to exercise or perform a discretionary function or duty . . . [by] a federal agency or an employee”⁵³ This limitation is commonly known as the “discretionary exception.”⁵⁴ The Federal Tort Claims Act served as a model for the states as they began to draft their own waiver of immunity statutes.

C. Ohio Court of Claims Act

1. Historical Evolution

Ohio embraced the doctrine of sovereign immunity as early as 1840⁵⁵ and reaffirmed the principle consistently throughout the nineteenth century.⁵⁶ In 1912, the Ohio Constitution was amended to abolish the state’s governmental immunity. The 1912 amendment provided that “[s]uits may be brought against the State, in such courts and in such manner, as may be provided by law.”⁵⁷

In 1917, however, the Ohio Supreme Court ruled that this amendment was only an authorization for subsequent statutes in which the General Assembly might grant its specific consent to be sued.⁵⁸ The court later explained this position:

[A]fter [the amendment] was adopted, the situation, in practical effect, was the same as before its adoption. Although the defense of governmental immunity was not available to the State, the defense of lack of consent by the General Assembly to such suit was available. Thus, an action based on tort was not properly maintainable against the State of Ohio unless it consented to such suit.⁵⁹

48. Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946); 28 U.S.C. §§ 1346(b), 2671–2680 (1982). This Note will only examine the Federal Tort Claims Act in a general fashion insofar as it relates to the adoption of waiver of immunity statutes by the states.

49. 28 U.S.C. § 2674 (1982).

50. 28 U.S.C. § 2680(b) (1982).

51. 28 U.S.C. § 2680(j) (1982).

52. 28 U.S.C. § 2680(h) (1982).

53. 28 U.S.C. § 2680(a) (1982).

54. Hall, *supra* note 42, at 206.

55. *State v. Franklin Bank*, 10 Ohio 91 (1840), *rev'd sub nom.*, *Franklin Branch Bank v. Ohio*, 66 U.S. 474 (1862); *Cf. Haverlack v. Portage Homes*, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

56. *See, e.g., State ex rel. Ogelvee v. Cappeller*, 39 Ohio St. 207 (1883); *State ex rel. Parrott v. Board of Pub. Works*, 36 Ohio St. 409 (1881); *Seely v. State*, 11 Ohio 501 (1842), *aff'd on rehearing*, 12 Ohio 476 (1843).

57. OHIO CONST., art. I, § 16.

58. *Raudabaugh v. State*, 96 Ohio St. 513, 118 N.E. 102 (1917). *Cf. Haverlack v. Portage Homes*, 2 Ohio St. 3d 26, 446 N.E.2d 749 (1982).

59. *Krause v. State*, 31 Ohio St. 2d 132, 144, 285 N.E.2d 736, 743 (1972), *appeal dismissed*, 409 U.S. 1052 (1972). *Cf. Haverlack v. Portage Homes*, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

In 1975, the Ohio General Assembly expressly consented to be sued by creating the Court of Claims that has jurisdiction to adjudicate virtually all claims against the state.⁶⁰ Since the Court of Claims Act specified both the courts and the manner in which the state was to be sued, the Ohio Supreme Court construed this Act to be the specific consent that was lacking in the constitutional amendment adopted sixty-three years earlier.⁶¹

2. Present Framework

State statutes waiving immunity have generally taken three different forms: (1) absolute waivers; (2) limited waivers that allow only certain claims; and (3) general waivers subject to specific exceptions.⁶² Ohio's statutory waiver in the Court

60. OHIO REV. CODE ANN. § 2743.02(A) (Anderson 1987); *see also* Bueger v. Office of Pub. Defender, 17 Ohio App. 3d 29, 477 N.E.2d 1170 (1984) (Court of Claims has exclusive jurisdiction over all tort and contract actions against the state).

61. McCord v. Division of Parks and Recreation, 54 Ohio St. 2d 72, 375 N.E.2d 50 (1978); *see also* Schenkolewski v. Metroparks Sys., 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981). *Cf.* Haverlack v. Portage Homes, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982).

62. Comment, *Sovereign Immunity in Georgia*, 27 EMORY L.J. 717, 750 (1978). Absolute or "blanket" waivers completely abrogate state immunity. Limited waivers retain immunity, subject to certain exceptions, whereas general waivers establish liability, subject to certain exceptions. A survey of states' immunity statutes revealed the following:

State	Waiver Type
Alabama	None (immunity retained [ALA. CONST. art. I, § 14]).
Alaska	General (ALASKA STAT. § 09.50.250 (1962 & Supp. 1986)).
Arizona	General (ARIZ. REV. STAT. ANN. §§12-820.01, .02 (1985 & Supp. 1986)).
Arkansas	None (immunity retained [ARK. CONST. art. V, § 20]).
California	Limited (CAL. GOV'T. CODE § 815 (West 1980)).
Colorado	Limited (COLO. REV. STAT. § 24-10-106 (1982 & Supp. 1986)).
Connecticut	Limited (CONN. GEN. STAT. ANN. § 4-160 (West 1969 & Supp. 1987)).
Delaware	Limited (DEL. CODE ANN. tit. 10, § 4001 (Supp. 1986)).
Florida	General (FLA. STAT. ANN. §768.28 (West 1986)).
Georgia	Limited (GA. CONST. art. I, § 2).
Hawaii	General (HAW. REV. STAT. §662-2 (1985 Repl.)).
Idaho	Limited (IDAHO CODE § 6-903 (1983 & Supp.)).
Illinois	Absolute (ILL. CONST. art. XIII, § 4).
Indiana	General (IND. CODE ANN. § 34-4-16.5-1 (West 1983 & Supp. 1986)).
Iowa	General (IOWA CODE ANN. § 25A.4 (West 1971 & Supp. 1987)).
Kansas	General (KAN. STAT. ANN. § 75-6103 (1984)).
Kentucky	Limited (KY. REV. STAT. §44.072 (Michie 1986)).
Louisiana	None (immunity retained [LA. CONST. art. XII, § 101]).
Maine	Limited (ME. REV. STAT. ANN. tit. 14 § 8103 (1980 & Supp. 1986)).
Maryland	Limited (MD. STATE GOV'T CODE ANN. § 12-104 (1984)).
Massachusetts	General (MASS. ANN. LAWS ch. 258 § 2 (Michie/Law Co-op 1980 & Supp. 1987)).
Michigan	Limited (MICH. COMP. LAWS ANN. § 691.1407 (West 1987)).
Minnesota	General (MINN. STAT. ANN. § 3.736 (West 1977 & Supp. 1987)).
Mississippi	Limited (MISS. CODE ANN. § 11-46-5 (Supp. 1986)).
Missouri	Limited (MO. ANN. STAT. § 537.600 (Vernon 1953 & Supp. 1987)).
Montana	General (MONT. CODE ANN. § 2-9-102 (1986)).
Nebraska	Limited (NEB. REV. STAT. § 81-8209 (1981)).
Nevada	General (NEV. REV. STAT. ANN. § 41.031 (1986)).
New Hampshire	None (immunity retained [N.H. REV. STAT. ANN. § 99-D:6 (Supp. 1985)]).
New Jersey	Limited (N.J. STAT. ANN. § 59:2-1 (West 1982)).
New Mexico	Limited (N.M. STAT. ANN. § 41-4-4 (1986)).
New York	Absolute (N.Y. JUD. LAW § 8-12 (McKinney 1963)).
North Carolina	Limited (N.C. GEN. STAT. § 143-291 (1983)).
North Dakota	Limited (N.D. CENT. CODE § 32-12.1-15 (Supp. 1985)).
Ohio	Absolute (OHIO REV. CODE ANN. § 2743.01 (Anderson 1981 & Supp. 1986)).

of Claims Act is absolute and contains few exceptions.⁶³ The definitional section of the Ohio Court of Claims Act specifically exempts political subdivisions of the state from the waiver of sovereign immunity contained in the Act.⁶⁴ The only other significant limitation to the waiver specifies that it "shall be void if . . . the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that [the officer or employee] . . . acted with malicious purpose, in bad faith, or in a wanton or reckless manner."⁶⁵ The Court of Claims Act is the statutory provision that permitted the plaintiff in *Reynolds* to sue the state.

III. OBJECTIONS TO *REYNOLDS*

Governmental tort liability may encourage the state to be more careful or efficient in the discharge of its duties and responsibilities.⁶⁶ Governmental liability also spreads the loss over society rather than requiring the individual to bear the cost alone.⁶⁷ The Ohio Supreme Court's decision in *Reynolds v. State* implicitly advances these policies by finding that a statutory duty to confine furloughed prisoners gives rise to a concomitant legal duty. The majority's major premise was that a violation of the statutory duty to confine furloughed prisoners when not in their rehabilitation programs constituted negligence per se.⁶⁸

The dissent in *Reynolds* argued that the Ohio Court of Claims Act should be narrowly interpreted,⁶⁹ and made four primary objections to the majority's position: (1) the state owed no duty to the plaintiff; (2) the action is not one that could be brought under the Court of Claims Act; (3) the imposition of liability on the state would be overly burdensome; and (4) no justification existed for a discretionary/ministerial analysis.⁷⁰

Oklahoma	Limited (OKLA. STAT. ANN. tit. 51, § 153 (West Supp. 1987)).
Oregon	General (OR. REV. STAT. § 30.265 (1983)).
Pennsylvania	Limited (PA. CONS. STAT. ANN. §§ 2310, 8522 (Purden 1986)).
Rhode Island	General (R.I. GEN. LAWS § 9-31-1 (1985)).
South Carolina	Limited (S.C. CODE ANN. § 15-78-20 (Law Co-op Supp. 1986)).
South Dakota	Limited (S.D. CODIFIED LAWS ANN. § 21-32-16 (1979 & Supp. 1986)).
Tennessee	Limited (TENN. CODE ANN. § 29-20-201 (1980 & Supp. 1986)).
Texas	Limited (TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (Vernon 1986)).
Utah	Limited (UTAH CODE ANN. § 63-30-3 (1986)).
Vermont	General (VT. STAT. ANN. tit. 12, § 5601 (1973)).
Virginia	General (VA. CODE § 8.01-195.3 (1984 & Supp. 1986)).
Washington	Absolute (WASH. REV. CODE ANN. § 4.92.090 (Supp. 1987)).
West Virginia	None (immunity retained [W. VA. CONST. art. VI, § 35]).
Wisconsin	Limited (WIS. STAT. ANN. § 893.80 (West 1983 & Supp. 1986)).
Wyoming	Limited (WYO. STAT. § 1-35-102 (1977)).

63. See OHIO REV. CODE ANN. §§ 2743.01-.09 (Anderson 1987).

64. OHIO REV. CODE ANN. § 2743.01(B) (Anderson 1987) (political subdivisions defined as municipal corporations, townships, counties, school districts, and other governmental bodies geographically smaller than the state); see also Haas v. City of Akron, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977). Cf. Haverlack v. Portage Homes, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982); but see *supra* note 5.

65. OHIO REV. CODE ANN. § 2743.02(A) (Anderson 1987).

66. See Glannon, *The Scope of Public Liability Under the Tort Claims Act: Beyond the Public Duty Rule*, 67 MASS. L. REV. 159, 167 (1982); see also Mayle v. Pennsylvania Dept. of Highways, 479 Pa. 384, 388 A.2d 709 (1978).

67. Comment, *supra* note 62, at 742.

68. *Reynolds v. State*, 14 Ohio St. 3d 68, 69, 471 N.E.2d 776, 777-78 (1984).

69. *Id.* at 71, 471 N.E.2d at 779 (Holmes, J., dissenting).

70. *Id.* at 72-74, 471 N.E.2d at 779-81.

A. Lack of Duty

To establish liability based on negligence for injuries to another, a duty owed to the injured person must exist.⁷¹ Consequently, the dissenter's first criticism is that the state owed no duty to the plaintiff, and a cause of action based on negligence could not be maintained as a matter of law.⁷² The justification for this argument rests on two lines of reasoning: first, statutory or public duties of state employees create no cause of action in third parties; second, because the furlough statute was not designed to protect the public, no "special duty" to the public at large was created.

1. "Public Duty" Distinction

Courts in some jurisdictions have adopted a "public duty" rule which maintains that a general statutory duty to the public at large creates no specific duty to an individual member of the public.⁷³ This rule effectively withholds relief from injured individuals by denying them a cause of action against a governmental unit. In Ohio, the Franklin County Court of Appeals adopted this line of reasoning in a 1976 decision, *Shelton v. Industrial Commission*.⁷⁴ The court in *Shelton* ruled that Ohio statutes authorizing the inspection and enforcement of safety standards were meant to protect the public generally and created no duty toward any particular person.⁷⁵ Under this analysis, the confinement requirement in the furlough statute would be a "public duty" that would not support a private cause of action against the state.

This reasoning, however, is of questionable validity. Such a restrictive "special duty"/"public duty" dichotomy would result in a duty to none when there is, in reality, a duty to all.⁷⁶ The artificiality of this distinction was recognized by the Wisconsin Supreme Court when it held that "any duty owed to the public generally is a duty owed to individual members of the public."⁷⁷

Furthermore, such analysis is inconsistent with Ohio law. Specifically, principles of statutory construction favor an interpretation of the furlough statute that would find the state to have a mandatory duty of confinement. An Ohio court of appeals observed that "[i]t is a general rule that those statutory measures which are intended for the security of the citizens . . . are mandatory."⁷⁸ There is virtually no question that the confinement provision was intended to protect society by closely monitoring

71. See, e.g., W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS*, § 30, p. 164 (5th ed. 1984); *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928); see also *Cain v. State*, 14 Ohio App. 3d 105, 470 N.E.2d 208 (1984); *Stamper v. Parr-Ruckman Motor Sales*, 25 Ohio St. 2d 1, 265 N.E.2d 785 (1971).

72. *Reynolds v. State*, 14 Ohio St. 3d 68, 72-73, 471 N.E.2d 776 (Holmes, J., dissenting).

73. See, e.g., *McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (Ariz. Ct. App. 1977); *Quintano v. Industrial Comm'n*, 29 Colo. App. 319, 485 P.2d 733 (Colo. Ct. App. 1971), *aff'd*, 178 Colo. 131, 495 P.2d 1137 (1972); *Cheney v. Dade County*, 353 So. 2d 623 (Fla. Dist. Ct. App. 1977); *Crouch v. Hall*, 406 N.E.2d 303 (Ind. App. 1980).

74. 51 Ohio App. 2d 125, 367 N.E.2d 51 (1976).

75. *Id.* at 131, 367 N.E.2d at 54.

76. See, e.g., *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1015 (Fla. 1979); *Dinsky v. Framingham*, 386 Mass. 801, 809, 438 N.E.2d 51, 55 (1982).

77. *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 540, 247 N.W.2d 132, 139 (1976).

78. *Woodmansee v. Cockerill*, 115 Ohio App. 409, 415, 185 N.E.2d 439, 443 (1961).

all furloughed prisoners.⁷⁹ In addition, the interpretation of language, analogous to that contained in the Court of Claims Act, compels a similar result. The Ohio Supreme Court recently ruled that municipal corporations owe a special duty to individuals.⁸⁰ This duty was created by a state statute that read: "Municipal corporations . . . shall cause [roads, bridges, alleys, sidewalks] to be kept open, in repair, and free from nuisance."⁸¹ The confinement provision from which the statutory duty in *Reynolds* arises is identical to the above statute in its use of the imperative word "shall." This confinement provision reads: "A prisoner who is granted a furlough . . . shall be confined"⁸² The Ohio Supreme Court has consistently held that the word "shall" generally makes a statutory provision mandatory.⁸³ Based upon this statutory construction, both statutes cited above create a "special duty" to each member of the public at large. Both statutes prescribe affirmative, governmental duties to which the judiciary should give effect.

2. Purpose of the Furlough Statute

As a general proposition, a plaintiff may establish a statutory special duty only if the plaintiff is a member of a class that the statute was intended to protect.⁸⁴ Although the primary purpose of the furlough statute was rehabilitation through a partial release program,⁸⁵ the statute clearly evinces a strong concern for the protection of society by requiring confinement of the prisoners when outside their rehabilitation program.⁸⁶ Such confinement clearly was intended to prevent any additional criminal acts by the prisoner while on furlough.

The rape and assault perpetrated against the plaintiff in *Reynolds* is the very type of injury the confinement requirement was designed to prevent. Therefore, the plaintiff would qualify as an intended beneficiary of protection under the statute. This, in turn, would demonstrate the existence of a special duty flowing from the state toward the plaintiff.

B. "Private Parties" Restriction

Even if the furlough statute does impose a duty upon the state, a plaintiff cannot get relief unless the Court of Claims Act allows it. Prior to the decision in *Reynolds*, the Court of Claims Act was interpreted to preclude a cause of action that did not exist between private parties prior to the adoption of the Act.⁸⁷ The Act states: "The State

79. See *infra* notes 84-86 and accompanying text.

80. *Dickerhoof v. City of Canton*, 6 Ohio St. 3d 128, 131, 451 N.E.2d 1193, 1195 (1983); see also *Strohofer v. City of Cincinnati*, 6 Ohio St. 3d 118, 121, 451 N.E.2d 787, 789 (1983).

81. OHIO REV. CODE ANN. § 723.01 (Anderson 1987) (emphasis added).

82. OHIO REV. CODE ANN. § 2967.26 (Anderson 1987) (emphasis added).

83. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971); *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574, 576 (1956).

84. *Rankel v. City of New York*, 282 A.D. 173, 177, 123 N.Y.S.2d 485, 489 (1953), *aff'd*, 286 A.D. 1101, 145 N.Y.S.2d 729 (1955); see also *Hocking Valley Ry. Co. v. Phillips*, 81 Ohio St. 453, 459-60, 91 N.E. 118, 119 (1910); *Marsh v. Koons*, 78 Ohio St. 68, 73-74, 84 N.E. 599, 600-01 (1908).

85. *Reynolds v. State*, 14 Ohio St. 3d 68, 73, 471 N.E.2d 776, 780 (1984) (Holmes, J., dissenting).

86. *Reynolds v. State*, 14 Ohio St. 3d 68, 69, 471 N.E.2d 776, 777 (1984).

87. *Ross v. Shoemaker*, 3 Ohio App. 3d 31, 443 N.E.2d 1025, 1026 (1981).

hereby waives its immunity from liability and consents to be sued, and have its liability determined in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties.”⁸⁸ The dissent in *Reynolds* urged that relief for the plaintiff should be unavailable because the action could not “have been brought by private parties inasmuch as such parties do not have the right, duty, or program to incarcerate, parole, or partially release criminals as does the state.”⁸⁹

The dissenter’s reasoning attempts to construe the phrase “same rules of law applicable to suits between private parties” as meaning “same activities in which private parties participate.” The dissent’s argument assumes that the “private parties” restriction is jurisdictional in nature. Such a presumption is unwarranted. Imposition of the dissenter’s rationale would mean that because private individuals perform no governmental functions, the state would be liable only for activities it conducted concurrently with private parties. Such a limited reading would essentially emasculate the Act and re-establish the immunity of the state—the complete antithesis of what the general assembly intended in passing the Court of Claims Act. Instead, the phrase “same rules of law applicable to suits between private parties” should be construed as describing the procedures the Court of Claims will use in evaluating complaints. Such an interpretation would require that the procedural rules utilized in private litigation be used when the state is a party to the suit as well.

Another equally plausible interpretation, consistent with the Ohio General Assembly’s intent, was introduced by a California district court in construing similar language in the Federal Tort Claims Act.⁹⁰ Under this construction, the phrase would be interpreted to mean that Ohio gives its consent “to be treated by the injured party as if it were a private individual, amenable to court action without claim of immunity . . . where the negligence of its agents . . . has caused injury or damage to third parties.”⁹¹

C. *Financial Burden of Liability*

Theoretically, it is not the province of the judiciary to formulate public policy through a cost/benefit analysis:⁹²

[T]here is nothing to prevent [the general assembly] from . . . abolish[ing] immunity in any respect desired, however broad that may be and whatever effects it would have upon the financial condition of the state and the amount of taxes which citizens must pay for claims created by an unlimited waiver of liability.⁹³

Realistically, however, financial considerations may be an appropriate factor for courts to consider in certain cases.

88. OHIO REV. CODE ANN. § 2743.02(A) (Anderson 1987).

89. *Reynolds v. State*, 14 Ohio St. 3d 68, 73, 471 N.E.2d 776, 781 (1984) (Holmes, J., dissenting).

90. *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal. 1948).

91. *Id.* at 833.

92. *See Shelton v. Tucker*, 51 Ohio App. 2d 125, 131, 367 N.E.2d 51, 54 (1976).

93. *Id.*

Although more expansive liability may cost more than immunity, the alternative is the placement of an inordinate financial burden upon the innocent injured party.⁹⁴ If the state finds a certain policy to be advantageous, such as penal rehabilitation through a furlough program, it is only equitable to expect the state to bear the consequential damages resulting from negligent implementation. Because rehabilitation presumably benefits all state taxpayers, the misfortune of an injured party should similarly be shared by all state taxpayers.⁹⁵ Furthermore, private corporate enterprises have managed to operate successfully despite their exposure to tort liabilities. It is difficult to perceive why public entities would face a more severe hardship.⁹⁶ The experience of New York indicates that an expansive waiver of state immunity created no intolerable burden on its economy.⁹⁷ Indeed, the initial absolute waiver of immunity in Ohio demonstrates the speciousness of this argument when contrasted against the potential increase in liability that the state will face under *Reynolds*. There is little reason to believe that the decision in *Reynolds* will cause Ohio any significant additional financial burdens.

Even if claims made upon the state were to outstrip all available resources, the Ohio General Assembly could simply enact appropriate legislation to correct the problem. For example, many states have placed a limit on the recovery amount available to plaintiffs⁹⁸ or have retained immunity for certain critical areas of state conduct⁹⁹ while still meeting the general policy objectives outlined earlier.

94. See Comment, *supra* note 62, at 742. But cf. Kelley, *The Need for State Immunity from Suit*, 1983 DET. C.L. REV. 1321.

95. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 921.

96. *Id.*

97. McDonald, *The Administration of a Tort Liability Law in New York*, 9 LAW & CONTEMP. PROBS. 262, 280 (1942).

98. See COLO. REV. STAT. § 24-10-114 (1982 & Supp. 1986) (\$150,000 per claimant, \$450,000 per occurrence or up to insurance coverage limits); FLA. STAT. ANN. § 768.28 (West 1986) (\$100,000 per person, \$200,000 per occurrence); GA. CONST. art. 1, § 2 (limited to extent of insurance coverage); IDAHO CODE § 6-926 (1983 & Supp. 1986) (\$500,000 per occurrence); ILL. ANN. STAT. ch. 37, § 439.8 (Smith-Hurd 1972 & Supp. 1986) (\$100,000 per claimant); IND. CODE ANN. § 34-4-16.5-4 (West 1983 & Supp. 1986) (\$300,000 per person, \$5 million per occurrence); KAN. STAT. ANN. § 75-6105 (1984) (\$500,000 per occurrence); KY. REV. STAT. § 44.070 (Michie 1986) (\$100,000 per claimant, \$250,000 per occurrence); ME. REV. STAT. ANN. tit. 14, § 8105 (West 1980 & Supp. 1986) (\$300,000 per occurrence); MASS. ANN. LAWS ch. 258, § 2 (Michie/Law Coop. 1980 & Supp. 1986) (\$100,000 per occurrence); MINN. STAT. ANN. § 3.736 (West 1977 & Supp. 1987) (\$200,000 per claimant, \$600,000 per occurrence); MISS. CODE ANN. § 11-46-15 (Supp. 1986) (\$500,000 per occurrence); MO. ANN. STAT. § 537.610 (Vernon 1953 & Supp. 1987) (\$100,000 per claimant, \$800,000 per occurrence); NEV. REV. STAT. ANN. § 41.035 (Michie 1986) (\$50,000 per claimant); N.M. STAT. ANN. § 41-4-19 (1986) (\$300,000 per claimant, \$500,000 per occurrence); N.C. GEN. STAT. § 143-291 (1983) (\$100,000 per claimant); N.D. CENT. CODE § 32-12.1-15 (Supp. 1985) (limited to extent of insurance coverage); OKLA. STAT. ANN. tit. 51, § 154 (West Supp. 1987) (\$200,000 per person, \$1 million per occurrence); OR. REV. STAT. ANN. § 30.270 (1983) (\$100,000 per person, \$300,000 per occurrence); R.I. GEN. LAW § 9-31-2 (1985) (\$100,000 per occurrence); S.C. CODE ANN. § 15-78-120 (Law Co-op Supp. 1986) (\$250,000 per claimant, \$500,000 per occurrence); S.D. CODIFIED LAWS ANN. § 21-32-15 (1979 & Supp. 1986) (limited to extent of insurance coverage); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (Vernon 1986) (\$250,000 per person, \$500,000 per occurrence); VT. STAT. ANN. tit. 12, § 5601 (1973 & Supp. 1986) (\$75,000 per person, \$300,000 per occurrence); VA. CODE § 8.01-195.3 (1984 & Supp. 1986) (\$25,000 per claimant); WIS. STAT. ANN. § 893.80 (West 1983 & Supp. 1986) (\$50,000 per claimant); WYO. STAT. § 1-35-102 (1977) (limited to extent of insurance coverage). But see *Pfost v. State*, 42 Mont. 1957, 713 P.2d 495 (1985) (statutory limitations on tort damages against the state violated the equal protection clause of the Montana Constitution).

99. See, e.g., IND. CODE ANN. § 34-4-16.5-3(3) (West 1983 & Supp. 1986) (retaining immunity for damages from weather conditions on a public way); MINN. STAT. ANN. § 3.736(3)(l) (1977 & Supp. 1987) (retaining immunity for losses sustained by a patient or inmate in a state institution); MISS. CODE ANN. § 11-46-9(j) (1972 & Supp. 1986) (retaining immunity for imposition of a quarantine); S.C. CODE ANN. § 15-78-60(a)(21) (Law Co-op Supp. 1986) (retaining immunity for decisions to release or furlough persons in governmental custody); VT. STAT. ANN. tit. 12, § 5602(2) (1973) (retaining immunity for claims arising from assessment or collection of taxes).

Thus, the Ohio Supreme Court ruling that the state was liable to the plaintiff in *Reynolds* was an appropriate interpretation of Ohio law. However, the majority's analysis seems strained in attempting to limit the potential scope of future liability by reading a "discretionary exception" into the language of the Court of Claims Act.

D. Discretionary Exception

The Ohio Supreme Court defined the newly adopted "discretionary exception" as an exemption from liability "for legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion."¹⁰⁰ Although this discretionary exception and its interpretation did not forestall the state's liability in *Reynolds*, it is likely to have a significant impact on future cases.¹⁰¹

The traditional rationale for a discretionary exception is the proper distribution of power. A discretionary exception promotes the separation of powers by removing legislative policymaking and executive implementation of such policy from interference by courts and juries.¹⁰² Thus, the discretionary exception allows the legislative and executive branches of government to formulate and implement preferred policy decisions, while the judiciary merely interprets what the legislature has enacted. It has been held that a contrary result would "obstruct normal governmental operations and . . . place in inexperienced hands what the Legislature has seen fit to entrust to experts."¹⁰³ A related justification is the need to assure the necessary freedom for innovative and courageous decision-making by legislative and executive officials without the threat of a lawsuit. As Judge Learned Hand commented: "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."¹⁰⁴

Many states explicitly exempt discretionary acts performed by state officials from their waiver of immunity statutes.¹⁰⁵ For example, language in the Kansas Tort Claims Act¹⁰⁶ exempts claims for damages "based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a

100. *Reynolds v. State*, 14 Ohio St. 3d 68, 70, 471 N.E.2d 776, 778 (1984).

101. See, e.g., *Applegate v. Ohio Dept. of Agric.*, 19 Ohio App. 3d 221, 483 N.E.2d 221 (1984) (statutory duty to issue a license is ruled discretionary and thus immune).

102. *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

103. *Id.* at 586, 167 N.E.2d at 66, 200 N.Y.S.2d at 413.

104. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

105. See ALASKA STAT. § 09.50.250(1) (1962 & Supp. 1986); ARIZ. REV. STAT. ANN. § 12-820.01 (Supp. 1986); CAL. GOV'T CODE § 820.2 (West 1980); DEL. CODE ANN. tit. 10, § 4001 (Supp. 1986); HAW. REV. STAT. § 662-125(1) (1976 & Supp. 1984); IDAHO CODE § 6-904(1) (1979 & Supp. 1986); IND. CODE ANN. § 34-4-16.5-3(6) (West 1983 & Supp. 1986); IOWA CODE ANN. § 25A.14(1) (West 1978 & Supp. 1987); KAN. STAT. ANN. § 75-6104(d) (1984); ME. REV. STAT. ANN. tit. 14, § 8103(2-c) (West 1980 & Supp. 1986); MASS. ANN. LAWS ch. 258, § 10 (Michie/Law Co-op 1980 & Supp. 1986); MINN. STAT. ANN. § 3.736(subdiv. 3[b]) (West 1977 & Supp. 1987); MISS. CODE ANN. § 11-46-9(c) (Supp. 1986); NEB. REV. STAT. § 81-8219(a) (1981); NEV. REV. STAT. ANN. § 41.032(2) (1986); N.J. STAT. ANN. § 59:2-3 (West 1982); OKLA. STAT. ANN. tit. 51, § 155(5) (West Supp. 1987); OR. REV. STAT. ANN. § 30.265(3-c) (1983); S.C. CODE ANN. § 15-78-60(5) (Law. Co-op Supp. 1986); TENN. CODE ANN. § 29-20-205(1) (1980 & Supp. 1986); TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1986); UTAH CODE ANN. § 63-30-10(a) (1986); VT. STAT. ANN. tit. 12, § 5602(1) (1973).

106. See KAN. STAT. ANN. § 75-6101-18 (1984).

governmental entity or employee, whether or not the discretion be abused."¹⁰⁷ There is no analogous express provision in the Ohio Court of Claims Act.¹⁰⁸ Although substantial case law exists in other jurisdictions to justify implying such an exception in the absence of express language,¹⁰⁹ the majority in *Reynolds* opted to construe the "private parties" restriction in the Act as a clear legislative desire to exempt discretionary conduct.¹¹⁰ Thus, the court did not have to imply a discretionary exception. Unfortunately, however, the court failed to adequately explain how future state conduct should be analyzed in order to exempt it as discretionary. The dissent was correct when it criticized the majority for providing little justification in "differentiating between the discretionary decision-making process of granting parole, and the ministerial operation of keeping the parolee confined when not engaged in work or educational programs."¹¹¹

Ever since the Federal Tort Claims Act first used the word,¹¹² courts have had difficulty in formulating a consistent definition of "discretionary."¹¹³ As one Ohio Supreme Court justice remarked, "No reported decision has been found which does more than set slippery standards in this area."¹¹⁴ Despite these ambiguities, three distinct approaches have emerged to define discretionary state action: (1) the semantic approach; (2) the "Good Samaritan" test; and (3) the planning-operational distinction.¹¹⁵

1. Semantic Approach

The first approach focuses on a dictionary or semantic definition of the term. Black's Law Dictionary defines "discretionary acts" as "[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take."¹¹⁶

The application of the semantic approach results in a broad interpretation of the "discretionary exception."¹¹⁷ For example, in *Dalehite v. United States*,¹¹⁸ the federal government was sued for injuries and deaths resulting from explosions of ammonium nitrate fertilizer that was being prepared for export overseas.¹¹⁹ The

107. KAN. STAT. ANN. § 75-6104(d) (1984).

108. See OHIO REV. CODE ANN. § 2743.02 (Anderson 1987); see also *Adamov v. State*, 46 Ohio Misc. 1, 9, 345 N.E.2d 661, 666 (Ct. Cl. 1975) (no discretionary exception in the Ohio Court of Claims Act).

109. See, e.g., *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979); *Hoy v. Cappelli*, 48 N.J. 81, 222 A.2d 649 (1966); *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

110. *Reynolds v. State*, 14 Ohio St. 3d 68, 70, 471 N.E.2d 776, 778 (1984). The court wrote: "The language . . . that 'the state' shall 'have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties . . . ' means that a state cannot be sued for its legislative or judicial functions" *Id.*

111. *Reynolds v. State*, 14 Ohio St. 3d 68, 73, 471 N.E.2d 776, 781 (1984) (Holmes, J., dissenting).

112. See *supra* notes 53-54 and accompanying text.

113. Note, *Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act*, 2 ALASKA L. REV. 99, 104 (1985).

114. *Enghauser Mfg. v. Eriksson Engr.*, 6 Ohio St. 3d 31, 38, 451 N.E.2d 228, 234 (1983) (Holmes, J., dissenting).

115. *Reynolds, The Discretionary Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 108-10 (1968-69).

116. BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

117. Note, *supra* note 113, at 104.

118. 346 U.S. 15 (1953).

119. *Id.*

United States Supreme Court denied recovery because of the discretionary exception in the Federal Tort Claims Act. The Court held that the exception excused both the initiation and implementation of governmental programs.¹²⁰

In defining the discretionary exception, the semantic approach is too broad because almost all governmental activities are characterized by some degree of discretion or choice, thereby excusing them from judicial review.¹²¹

2. The "Good Samaritan" Approach

The second approach imposes a non-discretionary duty of due care on the government. The "Good Samaritan" approach is best illustrated by the United States Supreme Court's decision in *Indian Towing Co. v. United States*.¹²² In *Indian Towing*, the Court found that the federal government was negligent in the operation of a lighthouse. The Supreme Court reasoned that the Coast Guard was protected in its original decision to operate a lighthouse for the safety of shippers.¹²³ However, the Court also concluded that since shippers relied on the Coast Guard for this service, the Coast Guard was obligated to exercise due care in operating the lighthouse.¹²⁴

The "Good Samaritan" test imposes a much narrower application of the discretionary exception than the semantic approach.¹²⁵ This standard also approaches a more equitable resolution of liability than does the semantic standard. For example, if the "Good Samaritan" test had been utilized in *Dalehite*, the government would have been responsible to exercise due care in its handling of ammonium nitrate, although the original discretionary decision to ship the fertilizer overseas still would remain protected. This was the approach utilized by the Ohio Supreme Court in *Reynolds*. The *Reynolds* court maintained that the state was not liable for its initial decision to furlough a prisoner, but once that decision had been made, the state was obligated to execute its policies in a prudent fashion.¹²⁶

This view of immunity, however, only removes initial governmental decisions from review; it does not extend immunity to lower, intermediate levels of decision making when bona fide policy making has been committed to such levels.¹²⁷ Thus, with its focus on the level of questioned decision making, this test can often be too restrictive in its application.

3. The "Planning-Operational" Approach

Neither the "Good Samaritan" test nor the semantic test provides a useful framework for defining a state's discretionary conduct.¹²⁸ The planning-operational

120. *Id.* at 35-36.

121. See *infra* note 128 and accompanying text; see also *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967).

122. 350 U.S. 61 (1955).

123. *Id.* at 69.

124. *Id.*

125. *Reynolds*, *supra* note 115, at 127-28.

126. *Reynolds v. State*, 14 Ohio St. 3d 68, 70, 471 N.E.2d 776, 778 (1984).

127. Note, *supra* note 113, at 106.

128. *Id.* at 107.

distinction¹²⁹ has also been utilized to define the extent of the discretionary exception. This approach classifies as discretionary all authorized governmental activities that are based on the evaluation of basic policy factors irrespective of the level of decision making.¹³⁰ One court explained:

The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic and social effects of a given plan or policy The operations level decision, on the other hand, involves decisions relating to the normal day-by-day operations of the government. Decisions made at this level may involve the exercise of discretion, but not the evaluation of policy factors.¹³¹

The planning-operational test distinguishes between those decisions that are basic policy determinations and those that simply implement policy. Thus, liability under this test is tied to an examination of the circumstances surrounding the questioned conduct. A judicial inquiry establishes whether the conduct was in fact dependent upon an evaluation of basic policy factors.¹³²

Unfortunately, this test has also proven inadequate because of the difficulty in its application.¹³³ For example, one court noted that:

It is not a sufficient defense for the government merely to point out that some decisionmaking power was exercised by the official whose act was questioned. Answering these questions . . . is not aided by importation of the planning stage-operational stage standard Such a distinction is specious. It may be a makeweight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."¹³⁴

The court held that the use of such conclusory labels served only to substitute a confusing set of standards for the ambiguities of the statute.¹³⁵

IV. A PROPOSED STANDARD FOR OHIO

Because no express statutory language mandating the use of a "discretionary" analysis exists, the Ohio Supreme Court could seek a more pragmatic approach to distinguish exempt state conduct. The essential question is whether the activities in question should be excluded from judicial review in order to serve the ultimate purpose of a discretionary exception—protecting the separation of powers. Absolute immunity should be accorded the state only when a suit threatens its ability to

129. The planning-operational test is virtually identical to the discretionary-ministerial dichotomy utilized by some courts.

130. Note, *supra* note 113, at 108.

131. *Swanson v. United States*, 229 F. Supp. 217, 220 (N.D. Cal. 1964).

132. *Harris & Schnepper, Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 189 (1976).

133. *See Payton v. United States*, 636 F.2d 132, 137-38 (1981), *rev'd in part on rehearing*, 679 F.2d 475 (5th Cir. 1982).

134. *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967) (quoting *Frankfurter, J.*, in *Indian Towing Co. v. United States*).

135. *Id.*

govern.¹³⁶ To best fulfill this purpose without unduly hindering the opportunity for injured individuals to recover just compensation from the state, a two-pronged approach might be employed to achieve an equitable yet realistic solution. At the first level, absolute immunity would be accorded to the legislative and judicial branches of state government. This would wholly insulate the legislature and state judiciary from suit. At the second level, the majority of state actions, including administrative decisions that are often labelled quasi-judicial or quasi-legislative, would be evaluated through a detailed interest analysis.¹³⁷ On the one hand, the court should consider the interests of the injured party, including the nature of the loss sustained, the expectations and reliance held by the injured party, and the availability of alternative remedies.¹³⁸ Alternatively, the court should balance these interests against the state's interests, including the nature of the governmental activity involved, the level at which the activity was undertaken, the political or policy overtones implicated, and the burden that liability would place on the state.¹³⁹ This approach holds the distinct advantage of allowing the court to facilitate the purposes for the discretionary exception without resorting to the use of conclusory labels. The government's need for immunity would be juxtaposed with the individual's need for compensation, allowing the court to reach the most equitable result on the specific facts in each particular dispute.

Even if the Ohio Supreme Court should decide that administrative decision making merits greater protection, the same analysis could be utilized. In this case, administrative decision making could receive a qualified immunity that would imbue the questioned conduct with a rebuttable presumption of exculpation. A court could only overcome this presumption through a considered and thoughtful balancing of interests.

V. CONCLUSION

The waiver of immunity in the Ohio Court of Claims Act is consistent with the actions other states have taken in restricting sovereign immunity. The *Reynolds* decision expands this potential liability to include responsibility for all affirmative state duties prescribed by statute.¹⁴⁰ Regardless of the policy questions raised, the Ohio General Assembly ultimately will have to intervene if it decides that liability should not accompany affirmative statutory duties placed on the state. In the absence of legislative action, the *Reynolds* expansion of tort liability is appropriate and consistent with principles of statutory construction applied to the present statutory framework.

136. See Comment, *Governmental Immunity and the Release of Dangerous Inmates from State Institutions: Can the State Get Away with Murder?*, 33 BUFF. L. REV. 491, 494 (1984).

137. See *Payton v. United States*, 636 F.2d 132, 144 (1981), *rev'd in part on rehearing*, 679 F.2d 475 (5th Cir. 1982).

138. See *id.* at 144-45.

139. See *id.*

140. Apparently, no liability will inure to the state without a violation of an express statutory command combined with a belief that the purpose of the statute was to protect against the type of injury that actually occurred. See *Juliano v. State*, 18 Ohio St. 3d 303, 304, 480 N.E.2d 817, 818 (1985).

To preserve flexibility, the “discretionary exception” quagmire could best be addressed through judicial interpretation. Proponents of governmental liability argue that fairness and morality justify an expansive liability of the state for its own torts. Conversely, proponents of limited immunity contend that effective governmental administration demands some insulation from liability. Because of the difficulties the courts have experienced in delineating exempt “discretionary” conduct, the Ohio Supreme Court should seize the opportunity to forge a new standard. Although this standard would grant absolute immunity to decisions by the state legislature and state judiciary, the court could evaluate the vast majority of governmental functions—departmental and administrative operations—through an extensive balancing of interests. This approach would best effectuate the policies behind the need for a limited exclusion to the tort liability of the State of Ohio.

Robert Northness

